



January 6, 2017

Re: Draft Order No. R3-2017-0002. Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands

Dear Water Board Members and Staff:

Thank you for the opportunity to comment on the draft 2017 Ag Order. The Grower-Shipper Association represents over 170 growers, shippers, farm labor contractors, and supporting agribusinesses. Our members grow diverse field and nursery crops such as broccoli, strawberries, vegetable transplants, and wine grapes. We recognize that the implementation of the Order will continue to have a lasting impact on the ability of farmers to grow safe, healthy produce on the Central Coast and support vibrant rural communities.

Our comments are based on extensive experience in assisting members and Water Board staff with implementing the 2012 Ag Order. Since its adoption, we estimate that we have hosted some 16 workshops with a total of 600 attendees to assist members with compliance. During these workshops we reminded members of deadlines and provided timely "how-to" guides to assist with requirements such as identifying the location of impaired waterbodies and determining soil series for nitrate loading risk calculation. We sent numerous emails reminding members of upcoming deadlines and changing requirements. We also spent countless hours providing individual assistance to members with everything from understanding their well nitrate results to assisting with proper tier classification of their farm or ranch.

Through this experience we have firsthand knowledge of what has worked with the 2012 Order and what has failed. We hope these comments will shape a 2017 Order that will be mutually beneficial to water quality, the Water Board, and the agricultural community.

**We initially agreed with the approach outlined by Staff to have an interim Order with minor modifications pending the outcome of precedential actions at the State level. We still agree with this approach and are disappointed to see many substantive changes in the draft 2017 Order.** Uncertainty and unsubstantiated changes to the Order will undermine goodwill and divert efforts from implementing practices to improve water quality; instead the focus will be on attempting to understand and comply with new administrative and reporting requirements.

Our comments are grouped in the following categories:

- Expansion of Individual Reporting of Total Nitrogen Applied (TNA)
- Expansion of Monitoring and Reporting Program (MRP) Requirements
- Procedural and Process Concerns
- Dates and Implementation Details in Order and MRPs
- No Opportunity to Reevaluate Applicability of Tier 3 Requirements
- Draft 2017 Order Undermines Cooperative Approach

### Expansion of Individual Reporting of Total Nitrogen Applied (TNA):

- Removal of “Risk Units” contradicts State Water Board, Ag Expert Panel, and results in additional expansion of TNA requirement
- Individual TNA reporting contradicts Ag Expert Panel’s Recommended Regulatory Program
- TNA reporting needs significant refinement *before* expansion
- Retroactive requirement for reporting starting January 1, 2017 undermines goodwill
- **Action: 2012 Nitrate Loading Risk Calculation and Risk Unit language for Tier 2 and 3 ranches must remain intact**
- **Action: TNA reporting must remain risk-based and applicable only to high-risk units on Tier 2 and 3 ranches**
- **Action: TNA should have a January 1-December 31 time period with a 90 day processing period (April 1) before reporting is due. TNA should be on the basis of nitrogen APPLIED per acre during the reporting timeframe, regardless of whether the crop is still growing or harvested.**

We oppose the significant expansion of the Total Nitrogen Applied reporting to all Tier 2 and 3 farms/ranches with crop types with high potential to discharge nitrogen to groundwater and ask that the 2012 Nitrate Loading Risk Calculation, Risk Unit language, and risk-based reporting requirements remain intact.

The expansion contradicts the State Water Board’s contemplation of the nutrient requirements applying *only* to farms/ranches that calculate high nitrate loading risk under *both* methods. **We emphasize that there is a tremendous distinction between on-farm use of information to improve management practices and regulatory reporting requirements that are subject to public disclosure.**

State Order WQ 2013-0101: “We believe that the dischargers should have the opportunity to estimate their risk under either method... In effect, the discharger must submit to the nutrient management requirements of the Agricultural Order only if the discharger measures as high risk under both methods – a result that reduces the chances that a farm that is actually low risk will be categorized as high risk under the Agricultural Order.”

The expansion also contradicts the Ag Expert Panel’s recommendations that nitrogen reporting be achieved through a coalition model. Attachment A references the Agricultural Expert Panel convened by the State Water Board. However, Attachment A fails to include that the Agricultural Expert Panel’s #1 Recommendation is the “**Establishment of coalitions to serve as the intermediate body between farmers and the Regional Boards.**” Furthermore, the Panel’s final recommendation is the “Use of multi-year reported values and monitored trends **by the coalitions** to inform the agricultural community of progress, to improve understanding of what is reasonable to attain and expect, and to sharpen improvement efforts.” The final report goes on to state more specifically “The Panel emphasizes that reporting by growers and any data collection requirements should be **coordinated by third-party coalitions** where feasible, **rather than having farmers report directly to the Regional Water Boards.**”

Moreover, according to Staff outreach on the draft Order, **the elimination of risk units would further expand the TNA requirement by implicating crops that are not high risk if they are grown on the same ranch.** For example, if a ranch grows both strawberries and raspberries, Staff has indicated that TNA reporting would now be required for both the strawberries and raspberries; the raspberries could no longer be considered a separate, lower-risk unit that may not be subject to TNA reporting. The Ag Expert Panel also contemplated a reporting unit based on crop type or other growing characteristics. **The elimination of risk units results in a further expansion of the TNA reporting requirement that is not commensurate with potential risk.**

Finally, **the current TNA reporting system has significant shortcomings and is in dire need of refinement, rather than expansion.** We have previously commented on the need for TNA reporting to be on a calendar year basis and per physical acre of a farm/ranch. More specifically, Staff outreach has communicated the intention that unharvested crops would still need to be carried over to the following reporting year. This will create greater confusion and potential for inaccuracies in reported information. We reiterate that:

- 1. TNA should have an annual reporting timeframe (January 1-December 31) with a 90 day processing period (April 1) before reporting is due.**
- 2. TNA should be on the basis of nitrogen APPLIED per acre during the reporting timeframe, regardless of where the crop is in the growing cycle (still growing or harvested). This will produce the same result over an extended period, will be easier for growers to report, and will result in better and more consistent information for the Water Board.**

**Without addressing the unharvested/harvested issue, the change in annual reporting timeframe will not improve the accuracy or ease of reporting information and might actually be worse** due to holiday conflicts, tax reporting deadlines, and travel for growing commitments outside of Region 3.

**We understand from Staff outreach that the current intention is to retroactively require TNA reporting for all applicable Tier 2 and 3 growers starting January 1, 2017 with reporting due March 1, 2018. We do not find it ethical to require reporting from periods prior to the adoption of the Order.** As previously detailed, if the draft Order is adopted as proposed, the tremendous expansion in the reporting requirement will mean that a significant number of risk units, farms/ranches, and operations will be subject to the TNA reporting requirement for the first time. **We ask in good faith that reporting requirements be initiated only after the adoption of the final 2017 Order and allow adequate time for outreach on any new requirements.**

We disagree with expanding the Total Nitrogen Applied reporting on a Regional basis until there is greater certainty from actions that are expected to set precedent on a State level.

#### **Expansion of Monitoring and Reporting Program (MRP) Requirements**

- Key provisions and details should be placed in the Order, rather than the MRPs, which is subject to interpretation and change at the Executive Officer's pleasure**
- Misleading "track changes" comparisons understate true scope of massive MRP expansions**
- Significant cumulative cost increase that cannot be passed on to buyers or consumers**
- Burden of complying with requirements is not reasonable when weighed against the need**
- Findings and evidence are insufficient to support the additional monitoring**
- Action: Place key requirements in the Order, rather than MRPs, and eliminate vague references of authority to provide certainty**
- Action: Maintain 2012 definitions of drinking water well for groundwater monitoring**
- Action: In consultation with cooperative surface water monitoring program, match sampling frequency to need and benefit**
- Action: Future substantive changes to the MRPs should be subject to a public process**

**During the implementation of the 2012 Order we have been frequently and severely disappointed with the liberties taken with MRP language such as "including but not limited to," "specified by the Executive**

Officer,” and the Executive Officer’s ability to change the MRPs at will and without a public or Water Board review process. **We believe that placing more specific requirements in the Order, rather than the MRPs, and deleting such board authority delegations would smooth implementation and perceived abuses of power.**

It is important to note that the “Track Changes” version of the draft MRPs compare the August 22, 2016 MRPs to the 2017 MRPs—not the MRPs as revised by the State Water Board Order in September 2013. **This comparison is misleading and a more transparent comparison of the 2013 and 2017 versions would show a significant expansion of reporting requirements in the 2017 MRPs.**

We oppose the following expansions in the draft MRPs:

- **Expansion of domestic groundwater monitoring program.** While we agree with the importance of protecting public health, we do not agree with memorializing the expansion of the Irrigated Lands Regulatory Program requirements from “all wells that are used or may be used for drinking water purposes” to “groundwater wells that are located within the property boundary of the enrolled county assessor parcel numbers (APNs).... For the purposes of this MRP, a well that is used or may be used for domestic use purposes is defined as any groundwater well that is connected to a residence, workshop, or place of business that may be used for human consumption, cooking, or sanitary purposes.”

**The latter definition prohibits any site-specific considerations that clearly differentiate a well used for drinking water purposes from any and all spigots that happen to be on the same APN as the enrolled ranch.** The cost and public availability of this information goes far beyond protecting the health of potential users and fails to recognize safeguards that are already in place, such as onsite treatment, signage, and/or provision of alternate drinking water supplies. We maintain that a sampling requirement that is congruent with the boundaries of the irrigated farm/ranch acreage is most appropriate for an Irrigated Lands Regulatory Program. **We ask that the Order maintain the 2012 definitions of a drinking water well for groundwater monitoring.**

- We ask that the wording of the groundwater sampling requirement be revised to clarify that the requirement is for the **primary irrigation well per farm or ranch** and not per APN to reflect the variety of well and APN configurations throughout the Central Coast.
- We do not agree with the addition of neonicotinoids to the surface water sampling requirement. **We understand that this would set statewide precedent and do not believe that there have been transparent or sufficient findings to substantiate the increased cost and reporting burden.**
- We are particularly concerned with the **cumulative increase in cost of the surface water cooperative monitoring program due to changes in the frequency and constituents being sampled.** We defer to our colleagues at Preservation, Inc. to articulate the impact of these changes on the cooperative surface water monitoring program. As price-takers competing with other states and countries, Central Coast agriculture has limited opportunities to pass these increases in cost on to buyers and consumers. **We are concerned with the precedent, relative benefit of the additional information, and cumulative impact on Central Coast agriculture’s economic viability. We ask the Water Board and Staff to consult with the cooperative surface water monitoring program to match sampling frequency and constituents to need and benefit.**

We will detail additional comments regarding dates and timing of the MRPs in the TNA and Implementation Details portions of this letter. We will also detail additional comments specific to the Tier 3 INMP Effectiveness Report and Water Quality Buffer Plan later in this letter.

**At an absolute minimum, we ask for the incorporation of a mechanism to ensure that future substantive changes to the MRPs are subject to a public notice and review process.**

### Procedural and Process Concerns

- **Scope of proposed changes and informational items versus Board direction understated in Staff reports and presentations at Water Board meetings**
- **Most substantive Staff recommendations and Board discussion emerged only after the close of public comment**
- **Key provisions and details should be placed in the Order, rather than the MRPs, which is subject to interpretation and change at the Executive Officer's pleasure**
- **Misleading "track changes" comparisons understate true scope of massive MRP expansions**

**We have been extremely disappointed in the "public process" regarding the August 2016 MRP release and draft 2017 Order development. We believe that a more transparent process with open dialogue would have resulted in a better process and outcome.**

During early, formative Board meetings, the Staff reports and presentations were falsely couched as "informational items" and **did not convey the substantive changes being contemplated when, in fact, substantive Board discussion and changes in direction occurred only *after* the close of public comment.**

In July, the Staff report for Agenda Item 6 included the following language: "The proposed 2017 ag order (version 3.0) will be largely unchanged from the current order in most aspects, but will have new compliance dates..." and "...without a large degree of change from current version." This position was also conveyed in the Staff presentation. However, after public comment closed, Board discussion resulted in Staff interpreting this discussion as direction to make very substantive changes that emerged as the August 2016 MRPs. **The specifics of these MRP changes were never disclosed or afforded public review prior to the Board issuing direction in July.**

In September, the Staff report for the "informational" Agenda Item 11 listed potential changes to dates, but did not reference a conceptual or specific Staff recommendation regarding the expansion of the Total Nitrogen Applied reporting requirement. **The Staff presentation did include a passing reference to the potential expansion of the Total Nitrogen Applied Requirement but at less than 1 minute in total duration, it did not convey any specific details or Staff recommendations that would later emerge only after public comment had closed** (Audio 1-TNA mentioned from minute 20:15 to 21:05; Public Comment Opened at Audio 1, minute 24:00). The Staff PowerPoint presentation was not posted online until after the meeting and the public never had the opportunity to see the "Extra Slides" that guided Board discussion until after public comment had closed. **The public was not provided an adequate opportunity to comment on the expansion of the TNA reporting prior to Board issuing direction in September. We would have prepared more specific comments if the nature of the solicited discussion or Staff recommendations for the TNA reporting expansion had been made publicly available.**

We are deeply disappointed at the "Public Process" involved in drafting the 2017 Order. This comment letter has been the first opportunity to provide specific feedback on the substantial draft changes that emerged outside of a transparent public process.

As previously mentioned, during the implementation of the 2012 Order we have been frequently and severely disappointed with the liberties taken with MRP language such as "including but not limited to," "specified by the Executive Officer," and the Executive Officer's ability to change the MRPs at will and without a public or Water Board review process. We believe that placing more language in the Order, rather than the MRPs, and deleting such board authority references would smooth implementation and perceived abuses of power.

We reiterate that the “Track Changes” version of the review draft MRPs compare the August 22, 2016 MRPs to the 2017 MRPs—not the MRPs as revised by the State Water Board in September 2013. This comparison is misleading and a more transparent comparison of the 2012 and 2017 versions would show a significant expansion of reporting requirements.

#### Dates and Implementation Details in Order and MRPs

- **Action: Maintain set calendar date of March 1 for eNOI updates**
- **Action: Retain 60 day timeframe for enrollment and termination requirements**
- **Action: Implement standard TNA reporting deadline of April 1**

We do not agree with deleting a set calendar date for eNOI updates (previously October 1). This will create confusion and make it more difficult to comply. **We believe that a set calendar date for the eNOI update, such as March 1, will be most conducive to compliance. This has enabled us to provide consistent outreach reminders to members, while a rolling date would not.**

**We do not believe that 30 days is adequate for entering mid-year changes, along with enrolling and terminating operations. The previous 60 day timeframe should be maintained.**

**We adamantly oppose the imposition of a 30 day reporting timeframe for “all required reporting.”** This is particularly troublesome for Total Nitrogen Applied Reporting for mid-year terminations. **We believe a standard, April 1 reporting timeline would be most conducive to compliance. The minimum time period should be 60 days from the date of termination.** A 30 day timeframe would not allow adequate processing time for the TNA reporting. Obtaining and reviewing all records and entering them in the Water Board’s reporting format is a tremendous undertaking. There is an important distinction between records used for internal management purposes, tax reporting purposes, and Water Board regulatory compliance reporting. **A 60 day processing period is the minimum amount of time needed to address these logistical difficulties.**

As previously mentioned, we do not agree with a March 1 deadline for TNA reporting. The due date should be April 1 to allow time to process the information into format required by Water Board.

#### No Opportunity to Reevaluate Applicability of Tier 3 Requirements

- **Disconnects requirement for Water Quality Buffer Plan and Irrigation and Nutrient Management Plan Effectiveness Report from risk in 2017 Order and instead cements 2012 determinations**
- **Tier 3 reporting needs significant refinement *before* expansion**
- **Action: Tier 3 INMP and Water Quality Buffer Plan requirements should be based on current, not historical risk assessments**

We are concerned with the treatment of Tier 3 farms/ranches regarding the Irrigation and Nutrient Management Plan (INMP), INMP Effectiveness Report, and Water Quality Buffer Plan requirements. **We are concerned that there is no opportunity for the applicability of these requirements to change, even if the underlying risk factors have changed during the 2012 and/or 2017 Orders. We do not find it ethical to bind operations to reporting requirements based on previous circumstances.**

Furthermore, there is **too much ambiguity** in the INMP Effectiveness Report and Water Quality Buffer Plan. In implementing the 2012 Order, many liberties have been taken and **the requirements specified at the discretion** Grower-Shipper Assoc of SB and SLO Counties

**of the Executive Officer do not appear to be consistent with the intent of the information.** There are currently **significant implementation challenges** to the Tier 3 Water Quality Buffer Plan and Irrigation and Nutrient Management Plan Effectiveness Report. **We ask that these issues be resolved and that Tier 3 operations not be permanently bound to requirements based on circumstances during the 2012 Order.**

### **Draft 2017 Order Undermines Cooperative Approach**

- **Role of Coalitions in Total Nitrogen Applied reporting**
- **Cooperative Groundwater Monitoring**
- **Cooperative Surface Water Monitoring**
- **Action: Carefully consider the implications of decisions on the viability of cooperatives**

**We strongly believe that industry-led engagement and cooperation is the best way to meaningfully improve water quality in the long term.** In addition to our comments regarding the important role of coalitions in Total Nitrogen Applied in this letter, we are concerned with the draft 2017 Order's treatment of cooperative groundwater and surface water monitoring. Based on the changes to the MRPs, we are concerned that the increase in cost and requirements will make it difficult for cooperatives to create enough of an incentive for operations to choose cooperative participation over individual compliance. Concerns with the increase in cost and fragmentation of the agricultural community are amplified if a vines and wines WDR is pursued. Based on conversations with Staff, we are concerned with the likelihood of Staff recommending and the Executive Officer approving a cooperative groundwater monitoring program that is different enough from the individual requirements to create an incentive to join. **We ask that the Board carefully consider the implications that its decisions may have on the ability of cooperatives and coalitions to effectively provide leadership in implementing the Order and improving water quality.**

### **Conclusion**

These comments outline our concerns with the draft 2017 Order. We specifically ask that:

1. 2012 Nitrate Loading Risk Calculation and Risk Unit language for Tier 2 and 3 ranches remain intact.
2. TNA reporting must remain risk-based and applicable only to high-risk units on Tier 2 and 3 ranches.
3. TNA should have a January 1-December 31 reporting timeframe with an April 1 due date. TNA should be on the basis of nitrogen APPLIED per acre, regardless of whether the crop is still growing or harvested.
4. Place key requirements in the Order rather than MRPs and eliminate vague references of authority.
5. Maintain 2012 definitions of a drinking water well for groundwater monitoring.
6. Match sampling frequency to need and benefit for the cooperative surface water monitoring program.
7. Future substantive changes to the MRPs should be subject to a public process.
8. Maintain set calendar date of March 1 for eNOI updates. Retain 60 day timeframe for enrollment and termination requirements. Implement standard TNA reporting deadline of April 1.
9. Tier 3 INMP and Water Quality Buffer Plan requirements should be based on current risk assessments.
10. Carefully consider the implications of decisions on the viability of cooperatives.

We believe we will move towards the goal of improved water quality much sooner if there is a positive working relationship between the Water Board and the agricultural community. Goodwill from both sides can be developed and maintained if regulatory requirements are carefully considered, have meaningful impact relative to the burden they impose, are fundamentally fair, and are developed in a transparent public process. We believe addressing the points listed above would be tremendously helpful in moving in that direction.

We plan to remain actively engaged in the development and implementation of the 2017 Ag Order and its successor to better meet the mutual goals of continued agricultural vitality and improved water quality.

Sincerely,



Claire Wineman  
President